Filed 10/31/16 P. v. Fortner CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL FORTNER, Defendant and Appellant.	H041289 (Monterey County Super. Ct. No. SS140820)

Defendant Michael Fortner was convicted by jury trial of one count of criminal threats (Pen. Code, § 422),[1] and the jury found a prior strike (§ 1170.12) allegation true. He was committed to state prison to serve a 16-month term consecutive to his existing prison term. On appeal, he contends that the jury's verdict is not supported by substantial evidence and that the trial court prejudicially erred in rejecting his pinpoint instruction and instructing the jury with CALCRIM No. 1300 on the elements of the offense. We reject his contentions and affirm the judgment.

[1] Subsequent statutory references are to the Penal Code unless otherwise specified.

I. The Prosecution's Case

In April 2010, Jane Doe and defendant were on vacation in Hawaii. Defendant became upset and argued with Doe in their hotel room. He pushed her down, and she responded by throwing a cup at him. The cup missed him, but he reacted by punching Doe in the eye. She lost consciousness and thereafter lost her vision in this eye. Doe did not report the Hawaii incident to the police at that time.

Doe married defendant in September 2010. On November 4, 2011, defendant became very upset when Doe was late arriving home from work. He strangled Doe to unconsciousness. When she regained consciousness, he again strangled her to unconsciousness. Defendant warned her not to tell her sons and said: "'Don't think I won't stop with them like I stopped with you.'" He told her that she "needed to learn my lesson . . . needed to . . . know my place . . . that and basically that he would be the one to teach me that." Doe reported this incident to the police and testified in court about it.

In March 2014, Doe was in the courtroom for defendant's sentencing hearing for the November 2011 offenses. Defendant was served with "divorce papers" just before the sentencing hearing began. When he was served, defendant told the person who served him that he "was expecting it," but he looked "agitated . . . ." Doe gave an "impact statement" to the court during the sentencing hearing, and she asked the court to impose the maximum sentence. After she gave her impact statement, she sat down in the courtroom in "the very last row" on the same side as the jury box. There were six rows of seats. Doe was seated between a male friend and a victim's advocate from the prosecutor's office.

Defendant was in the jury box in the area closest to the audience. Although he was shackled, defendant was standing, rocking back and forth, "banging on the counter," and tapping his knuckles on the wall. There was a microphone hanging above his head. Before defendant was sentenced, Doe noticed that he appeared "very upset" and was looking at her "often and for long periods." This made her nervous and afraid. Monterey

County Sheriff's Deputy Stephen Futch was serving as a backup bailiff in the courtroom during defendant's sentencing. Futch was standing near the jury box between defendant and Doe and closely watching defendant. He noticed that defendant appeared "pretty upset" and was looking at Doe.

While the court was "addressing . . . and sentencing" defendant, defendant "looked back at" Doe and appeared "very angry." As he was looking directly at her, she saw him mouth a number of words, but the only ones she could make out were "'Fuck you.'" She did not hear him say anything. The look on defendant's face while he was mouthing those words was same look he had had "when he beat me and strangled me." Doe became "very afraid."

Futch, who was standing four to 10 feet from defendant, clearly heard defendant softly say to Doe: "'I'm going to fuck you up.'" Defendant's attorney, who was standing closer to him than Futch, was listening to the judge speak when defendant said this. No one other than Futch heard defendant's statement, although the court reporter saw defendant's jaw moving.

When the sentencing hearing was over, Doe told the prosecutor what she had seen. The prosecutor talked to the court reporter and learned what she had seen, and then talked to Futch, who told the prosecutor what he had heard defendant say. The prosecutor returned to Doe and told her that defendant had said "'I'm going to fuck you up.'"[2] Doe became upset, "[v]ery nervous and very afraid" because she "believe[s] that he will hurt me."[3]

---

[2] The prosecutor testified at trial that she did so "[b]ecause I thought it was important for her personal safety to know that he had just made a threat." She was aware that defendant "was not going to be released from jail for a period of time."

[3] Doe testified at trial that she remained fearful that defendant would carry out his threat.

II. The Defense Case

Defendant testified at trial. He admitted that he had been convicted by jury trial of assault with a great bodily injury enhancement and corporal injury to a spouse. However, he denied that he had strangled Doe to unconsciousness. He conceded that he had put his hands on her throat during the November 2011 incident and that he had punched her in Hawaii.

From the beginning of the March 2014 sentencing hearing, defendant "was pretty certain I would get some sort of prison commitment," but he did not know "how long it would be" until the court imposed sentence. He denied that he said "anything out loud" when he was sentenced. Defendant testified that, after the court sentenced him to something more than "the least amount of time" that he could get, he was "upset" and "just mouthed kind of to myself that that was fucked up" while "looking directly at Jane Doe."[4] "I was pretty distraught. I don't think that I was trying to really convey much of a message."

Defendant denied that he had intended for Doe to hear what he mouthed and denied that he had intended to convey a threat to her. He also denied that he asked anyone to convey any information to Doe. Defendant explicitly denied that he had said the words that Futch heard.

---

[4] No testimony was received at trial about the precise length of the prison term to which defendant was sentenced at the March 2014 sentencing hearing. An abstract of judgment was introduced into evidence by the prosecution to prove the prior strike allegation, which was not bifurcated. This abstract reflected that defendant had been sentenced to nine years in state prison at the March 2014 sentencing hearing. The jury was told that the abstract was to be considered "only when deciding whether the defendant was previously convicted of the crime and allegation alleged or for the limited purpose of assessing credibility of the defendant. [¶] Do not consider this evidence as proof that the defendant committed the crime with which he's currently charged or for any other purpose." Although the jury was told that it could not consider this abstract with regard to the charged offense, we note that it reflected that he would be in prison for about six years.

III. Discussion

A. Substantial Evidence

Defendant contends that the prosecution failed to present substantial evidence to support the criminal threats count. He maintains that the prosecution failed to adduce substantial evidence that (1) there was an " 'immediate prospect of execution of the threat,' " (2) the words that Doe actually perceived defendant to be mouthing were a threat, (3) defendant "intended Futch to act as an intermediary in conveying a threat to Doe," and (4) defendant "intended to convey a threat directly to Doe . . . ."

"In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Defendant insists that we exercise de novo review because a criminal threats prosecution has "First Amendment implications . . . ." Defendant relies on *In re George T.* (2004) 33 Cal.4th 620 (*George T.*) to support this proposition. In *George T.*, the California Supreme Court held that "a reviewing court should make an independent examination of the record in a section 422 case *when a defendant raises a plausible First Amendment defense* to ensure that a speaker's free speech rights have not been infringed

by a trier of fact's determination that the communication at issue constitutes a criminal threat." (*George T.*, at p. 632, italics added.)

Defendant did not raise any First Amendment defense at trial. In his appellate reply brief, he suggests that the First Amendment is implicated by his appellate challenges to the sufficiency of the evidence because his statement (1) under the circumstances did "not convey an immediate prospect" of execution and (2) "was nothing but a vague curse . . . ." Neither contention raises First Amendment concerns. This is not a case like *George T.*, where the meaning of the poem that was alleged to be a threat was "vague" and "inherently ambiguous." (*George T.*, *supra*, 33 Cal.4th at pp. 636-637.) Defendant's "I'm going to fuck you up" threat was neither vague nor inherently ambiguous. De novo review is not merited in this case.

"'[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People* v. *Johnson* (1980) 26 Cal.3d 557, 576, quoting *Jackson* v. *Virginia* (1979) 443 U.S. 307, 318-319.) "[The] appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People* v. *Reilly* (1970) 3 Cal.3d 421, 425; accord *People* v. *Pensinger* (1991) 52 Cal.3d 1210, 1237.)

1. Immediate Prospect of Execution

Defendant claims that there is not substantial evidence that the threat "on its face *and under the circumstances in which it is made*, is so unequivocal, unconditional, immediate, and specific *as to convey to the person threatened*, a gravity of purpose and *an immediate prospect of execution* of the threat . . . ." (§ 422, italics added.) He maintains that "the circumstances in which [the threat was] made" could not have conveyed an "immediate prospect of execution" to Doe. Defendant points out that, when he made the threat, he was in custody and shackled inside the jury box, while Doe was in

the back of the courtroom sitting between a friend and an advocate. Defendant was being guarded and observed by a bailiff who was standing between defendant and Doe. At the time of the threat, defendant had just been sentenced to serve a prison term.

"The statute punishes those threats which *convey to the victim* a gravity of purpose and an immediate prospect of execution. The use of the word 'so' indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim. The four qualities are simply the factors to be considered in determining whether a threat, considered together with its surrounding circumstances, conveys those impressions to the victim." (*People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157-1158, italics added; accord *People v. Bolin* (1998) 18 Cal.4th 297, 339.)

Section 422 "does not require the showing of an immediate ability to carry out the stated threat." (*In re David L.* (1991) 234 Cal.App.3d 1655, 1660.) It requires only that the threat *convey to the victim* an immediate prospect of execution. Here, the evidence of the circumstances surrounding the threat supported a finding that the threat caused Doe to fear that defendant would immediately assault her in the courtroom. Even before she saw defendant mouth any words, Doe was "afraid" because defendant appeared "very upset," was staring at her, and had a history of violently assaulting her. She was afraid that "[h]e would somehow come back at me. And even though he was standing there shackled and there was [*sic*] bailiffs in the courtroom I still fear that. I still fear that somehow he could come after me or do something." These were the circumstances when defendant made the threat. When he mouthed the words of the threat, he looked directly at Doe with a "very angry" look on his face that was "very familiar" to her because he had had that look "when he beat me and strangled me."

It is true that, under the circumstances, defendant lacked the immediate ability to carry out his threat. Nevertheless, he had a unique ability to convey to Doe the

impression that he would do so because he had inflicted such injuries on her in the past. As he was clearly aware, she was so fearful of him that he could frighten her with just an angry look. Defendant took full advantage of Doe's fear of him to make a threat that conveyed an immediate prospect of execution to Doe even though a neutral observer probably would have viewed his threat differently given his incarceration. Under these circumstances, the jury could have found that defendant's threat conveyed to Doe an immediate prospect of execution.

Defendant contends that the third element of a section 422 violation could not be satisfied by the threat he made because "it was unreasonable for Doe to claim that she feared Fortner would carry out his threat in the courtroom while he was shackled and surrounded by deputies." This argument attempts to conflate the third and fifth elements of the offense. The third element focuses on the nature of the threat. The fifth element focuses on the victim's response to the threat. A particular threat may, under the circumstances, convey an immediate prospect of execution to a vulnerable victim even if the threatener actually lacks the ability to immediately execute the threat. And a jury could find that a victim reasonably experienced sustained fear as a result of a threat even if the immediate execution of the threat was unlikely. Nothing in the fifth element requires that the reasonableness of the victim's fear be evaluated based on the likelihood that the threat will be *immediately* executed. A jury could reasonably conclude that a victim's threat-generated fear was reasonable despite the defendant's apparent lack of the present ability to immediately execute the threat.

2. The Nature of the Threat

Defendant contends that the words that Doe actually perceived defendant to be mouthing at the time he uttered the threat did not constitute a threat. The prosecution did not assert at trial that the words "fuck you" that Doe perceived defendant to be mouthing constituted a threat. The prosecution was based on the words "I'm going to fuck you up" that Futch actually heard defendant say when defendant was staring at Doe and mouthing

the words that Doe actually perceived. As defendant was not prosecuted for saying "fuck you" to Doe, there is no substance to this contention.

3. Specific Intent

Defendant argues that, because Doe did not actually perceive his threat when it was being made, he could not be convicted without proof either that he intended to directly convey the threat to Doe or that he intended to convey it through a third party.

Section 422's specific intent element requires that the person making the threat have "the specific intent that the statement . . . is to be taken as a threat." (§ 422.) "[I]f one broadcasts a threat intending to induce sustained fear, section 422 is violated if the threat is received and induces sustained fear—whether or not the threatener knows his threat has hit its mark." (*People v. Teal* (1998) 61 Cal.App.4th 277, 281.) We agree with defendant that there was no evidence that he intended to convey his threat through a third party. But we disagree with his claim that there was not sufficient evidence that he intended to directly convey his threat to Doe. Defendant looked directly at Doe while he was mouthing his threat. His threat was plainly intended to be perceived by Doe because he referred to her as "you." The jury could have concluded that the fact that Doe was able to discern two of the six words of the threat reflected that defendant's mouthing was intended by him to be discernible by Doe from the back of the courtroom. Therefore, substantial evidence supports the specific intent element.

B. Jury Instructions

Defendant contends that the trial court prejudicially erred in rejecting his requested pinpoint instruction and instructing the jury with CALCRIM No. 1300.

1. Background

At the request of both parties, the court instructed the jury with CALCRIM No. 1300. "The defendant is charged [in] Count One with having made a criminal threat in violation of Penal Code section 422. [¶] To prove that the defendant is guilty of this

crime, the People must prove that: [¶] 1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to Jane Doe; [¶] 2. The defendant made the threat orally; [¶] 3. The defendant intended that his statement be understood as a threat and intended that it be communicated to Jane Doe; [¶] 4. The threat was so clear, immediate, unconditional, and specific that it communicated to Jane Doe a serious intention and the immediate prospect that the threat would be carried out; [¶] 5. The threat actually caused Jane Doe to be in sustained fear for her own safety; [¶] AND [¶] 6. Jane Doe's fear was reasonable under the circumstances. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. [¶] In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves, as well as the surrounding circumstances. [¶] Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act or intend to have someone else do so. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] Sustained fear means fear for a period of time that is more than momentary, fleeting, or transitory. [¶] An immediate ability to carry out the threat is not required."

Defendant asked the court to also give a pinpoint instruction on the specific intent element. The requested pinpoint instruction read: "If you find that it has been proven beyond a reasonable doubt that a threat was uttered by the defendant, you must determine whether it was specifically intended that the threat be communicated to the intended listener. [¶] If the threat was conveyed through a third party, then you must find that Mr. Fortner selected that third party with the specific intent that the third party convey the threat to the intended listener. [¶] If you [*sic*] the People have not proved beyond a reasonable doubt that Mr. Fortner specifically intended the threat to be communicated through a third party, then you must find Mr. Fortner not guilty."

The defense argued that the pinpoint instruction was necessary because the communication of the threat had been "via" the prosecutor, and defendant "never selected" the prosecutor "to pass the threat to Jane Doe." The prosecutor pointed out that CALCRIM No. 1300 already required a finding that defendant intended to communicate the threat to Doe. She also noted that the requested pinpoint instruction was "incorrect" and "mislead[ing]" as the evidence reflected that defendant intended "to convey the threat directly from him to Jane Doe . . . ." The court rejected the pinpoint instruction on the ground that the "CALCRIM instruction currently covers what is requested by the pinpoint instruction and more accurately reflects the current state of the law."

The prosecutor argued to the jury: "That it was communicated to Jane Doe. There are two ways a threat can be communicated: Directly to someone or through a third party. [¶] We have a hybrid here. But bottom line is defendant said it to her. He intended that she hear it out of his own mouth. He intended to make the threat to her. It just happens the third party also heard and also told her." The defense argued: "[I]f it was a third party conveyance of the threat there is another thing you have to consider. When a third party is conveying a threat did Mr. Fortner tell [the prosecutor] to convey that threat? Did he tell Deputy Futch to convey that threat? He did not." "[I]f you determine that he did this threat, then you have to determine if it was properly conveyed by the proper party that he specified. And he did not ask [the prosecutor] to convey this information." The prosecutor responded: "As far as the intent to convey the threat the jury instruction [(CALCRIM No. 1300)] reads specifically, 'The defendant intended that his statement be understood as a threat and intended that it be communicated to Jane Doe.' [¶] It doesn't specify in as much detail as [defendant's trial counsel] just stated. Of course the defendant didn't seek out the DA to pass on a threat. Of course the defendant didn't seek out a deputy to pass on a threat. [¶] However, he did intend that it be communicated to Jane Doe as he himself communicated it to her."

The jury asked a question during its deliberations: "Transcript - Jane Doe's testimony [¶] What did she say she saw mouthed by the defendant? [¶] Did she see more than 'f___ y__?'" The court responded by having the court reporter read back to the jury Doe's testimony.

2. Analysis

CALCRIM No. 1300 explicitly told the jury that the prosecution was required to prove that "defendant intended that his statement be understood as a threat and intended that it be communicated to Jane Doe." No evidence was presented that defendant intended for a third party to convey defendant's statement to Doe, and the prosecutor expressly disclaimed that defendant intended for a third party to communicate his threat to Doe. The prosecution's case rested solely on its assertion that defendant intended to directly communicate his threat to Doe.

Defendant claims that CALCRIM No. 1300 was inadequate because it did not require the jury to find that he intended for a third party to communicate his threat to Doe. He maintains that his requested pinpoint instruction was needed to inform the jury of that requirement.

"A trial court must instruct the jury, even without a request, on all general principles of law that are '"closely and openly connected to the facts and that are necessary for the jury's understanding of the case" [Citation.] In addition, "a defendant has a right to an instruction that pinpoints the theory of the defense . . . ."' [Citation.] The court may, however, 'properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation].'" (*People v. Burney* (2009) 47 Cal.4th 203, 246.)

By giving CALCRIM No. 1300, the trial court fulfilled its sua sponte obligation to instruct on the principles of law that were closely connected to the facts and necessary to the jury's understanding of the case. CALCRIM No. 1300 correctly told the jury that the

prosecution was required to prove that defendant intended for his threat to be communicated to Doe. No evidence was introduced at trial nor did anyone argue that defendant had intended for a third party to communicate his threat to Doe.

The trial court was not obligated to give defendant's pinpoint instruction. The requested pinpoint instruction was misleading, duplicative, and unsupported by substantial evidence. The requested pinpoint instruction consisted of three sentences. The first sentence ("If you find that it has been proven beyond a reasonable doubt that a threat was uttered by the defendant, you must determine whether it was specifically intended that the threat be communicated to the intended listener") was duplicative of CALCRIM No. 1300. CALCRIM No. 1300 told the jury that it had to determine whether defendant specifically intended that his threat be communicated to Doe. The second sentence of the requested pinpoint instruction ("If the threat was conveyed through a third party, then you must find that Mr. Fortner selected that third party with the specific intent that the third party convey the threat to the intended listener") was inaccurate and misleading. Although the full wording of the threat was actually communicated to Doe by a third party, the jury was not required to find that defendant "selected that third party" or intended "that the third party convey the threat" to Doe. The jury could convict defendant if it found that he specifically intended to directly communicate his threat to Doe. The third sentence of the pinpoint instruction ("If you [*sic*] the People have not proved beyond a reasonable doubt that Mr. Fortner specifically intended the threat to be communicated through a third party, then you must find Mr. Fortner not guilty") was also inaccurate and misleading. The prosecution was not required to prove that defendant intended the threat to be communicated through a third party. The prosecution could establish a section 422 violation by proving beyond a reasonable doubt that defendant intended to directly communicate his threat to Doe.

The trial court did not err in instructing the jury with CALCRIM No. 1300 and rejecting defendant's requested pinpoint instruction.

IV. Disposition

The judgment is affirmed.

_____
Mihara, J.

WE CONCUR:

_____
Elia, Acting P. J.

_____
Bamattre-Manoukian, J.